

IN THE COURT OF APPEALS  
FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

29,227

vs.

00025

Court of Appeals No.

District Court No. CR-08-

WAYNE BENT,

Defendant-Appellant.

CRIMINAL APPEAL FROM THE EIGHTH DISTRICT COURT

IN UNION COUNTY

THE HONORABLE GERALD BACA PRESIDING

BY DESIGNATION OF THE SUPREME COURT

APPELLANT'S BRIEF IN CHIEF

Submitted By:

John A. McCall  
Law Works L.L.C.  
Attorney for Defendant  
Wayne Bent  
823 Gold SW  
Albuquerque, NM 87102  
(505) 256-1998

## TABLE OF CONTENTS

Table of Authorities vi-xi

### I. SUMMARY OF PROCEEDINGS 1

#### A. Course of Proceedings 1

##### *Specific Procedural Issues Raised in the Docketing Statement 2*

##### 1. *The Grand Jury Process and Objections 2*

##### 2. *Pre-trial Motions 4*

#### B. Statement of Facts 6

##### *Expert Testimony 10*

### II. ARGUMENT 11

#### INTRODUCTION 12

A. ISSUE ONE - Whether the trial court erred in failing to quash the Grand Jury Indictment for any and all of the legal questions raised in Defendant's Motion to Quash Grand Jury Indictment and in doing so caused the Defendant to answer to Criminal charges that were not properly before the court. 13

##### 1. *Standard of Review 13*

##### 2. *Jurisdiction and the term of service 14*

##### 3. *Duty to disclose exculpatory evidence 15*

B. ISSUE TWO - Whether the trial court erred in limiting the Defense witnesses in order to force the time of trial to fit into the Court's time constraints, and in doing so, failed to allow the Defendant to put

on a  
Defense 16

1. *Standard of Review* 16

2. *Argument* 17

C. **ISSUE THREE - Whether the trial court erred in denying the Defendant his fundamental right to put on a defense by denying him the ability to utilize his original video presentation at closing, thereby foreclosing his use of demonstrative aids and/or by turning off the music on Defendant's final video presentation 22**

1. *Standard of Review* 22

2. *Argument* 22

D. **ISSUE FOUR - Whether the trial court erred in overruling the Defense Objections to the prosecution going beyond the scope of direct examination in the State's cross examination of the Defendant at trial 23**

1. *Standard of Review* 23

2. *Argument* 23

E. **ISSUE FIVE - Whether the trial court erred in failing to give Defendant's proposed jury instructions and in failing to define the term breast 25**

1. *Standard of Review* 25

2. *Argument* 25

3. *Mistake of Fact Instruction* 29

4. *Unlawfulness* 29

5. *The element of Intent* 31

**F and G. ISSUES SIX AND SEVEN - Whether the trial court erred in failing to hold an evidentiary hearing to determine the sufficiency of the evidence prior to trial or by failing to set aside the verdict where no testimony was given as to the completion of the elements of the crimes charged 32**

1. *Standard of Review* 32
2. *Argument - No evidence of touching the intimate part or of required intent* 33
3. *The CSC Statute was vague and failed to Adequately Notify the Defendant* 34
4. *The Two Convictions for Contributing to the Delinquency of a Minor* 36

**H. ISSUE EIGHT - Whether the conviction should be reversed due to prosecutorial misconduct 38**

**I. ISSUE NINE - Whether the failure to raise the New Mexico Religious Freedom Restoration Act as a defense to the charges was prima facie ineffective assistance of counsel 38**

1. *Standard of Review* 38
2. *Argument* 39

**J. ISSUE TEN- Whether cumulative error deprived the Defendant of a fair trial 43**

1. *Standard of Review* 43
2. *Argument* 43

**III. PRAYER FOR RELIEF 45**

**Certificate of Compliance 45**

**Certificate of Service 45**

THE RECORD IN THIS CASE CONTAINS THREE VOLUMES OF THE RECORD PROPER AND 13 TRANSCRIPTS OF THE PROCEEDINGS ALONG WITH ALL CD RECORDINGS OF PROCEEDINGS.

TRANSCRIPT REFERENCES ARE BY DATE EXCEPT FOR TRIAL TRANSCRIPTS REFERENCED BY NUMBER E.G. 1TR AND PAGE NUMBER

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

First Amendment 39

Sixth Amendment 18, 21

Fourteenth Amendment 21, 44

### US. SUPREME COURT CASES

*Ballard v. United States*, 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261 15

*Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727 (2006) 21

*Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) 42

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) 43

*United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982) 17

### FEDERAL CIRCUIT COURT CASES

*United States v. Bauer, et al.*, 84 F.3d 1549 (9th Cir. 1995) 41-42

*United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) 42

*United States v. Zirpolo*, 450 F.2d 424 (3d Cir. 1971) 15

## **U.S. DISTRICT COURT CASES**

*United States v. Boyll*, 774 F.Supp. 1333 (D.N.M. 1991) 41-42

*United States v. Manneh*, 2008 U.S. Dist. LEXIS 105209 (D.N.Y. 2008) 41

## **FEDERAL STATUTES**

42 U. S. C. § 2000bb-1(a),(c) 42

## **NEW MEXICO CONSTITUTION**

Article II, Section 14 18, 21, 44

Article II, Section 18 21, 28

Article VI, Section 2 6

## **NEW MEXICO CASES**

*Baird v. State*, 90 N.M. 667, 568 P.2d 193 (1977)  
13,14

*Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 15

*City of Albuquerque v. Sachs*, 2004 NMCA 65, 135 N.M.  
578, 92 P.3d 24 28

*Jones v. Murdoch*, 2009 NMSC 2, 145 N.M. 473, 200 P.3d  
523 13

*Jurado v. Jurado*, 119 N.M. 522, 892 P.2d 969 (Ct.App.  
1995) 22

*March v. State*, 105 N.M. 453, 734 P.2d 231 (1987) 17

*Reese v. State*, 106 N.M. 498 (1987) 35

*Security Trust v. Smith*, 96 N.M. 35, 596 P.2d 248  
(1979) 15

*State v Aragon*, 2009 NMCA 102 40, 43

*State v. Armendariz*, 2006 NMSC 36, 140 N.M. 182, 141 P.3d 526 16

*State v. Armijo*, 118 N.M. 802, 887 P.2d 1269 (Ct. App. 1994) 13

*State v. Augustin M.*, 2003 NMCA 65, 133 N.M. 636, 68 P.3d 182 41

*State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995) 44

*State v. Baca*, 1997 NMSC 59, 124 N.M. 333, 950 P.2d 776  
32-33

*State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App.  
1990) 30

*State v. Bernal*, 2006 NMSC 50, 140 N.M. 644, 146 P.3d 289 39

*State v. Bowman*, 104 N.M. 19, 715 P.2d 467 (Ct. App.  
1986) 17

*State v. Brown*, 1996 NMSC 73, 122 N.M. 724, 931 P.2d 69 25

*State v. Carter*, 21 N.M. 166, 153 P.d 271 (1915) 24

*State v. Chacon*, 62 N.M. 291, 309 P.2d 230 (1957) 14

*State v. Collins*, 80 N.M. 499 (1969) 35

*State v. Contreras*, 2007 NMSC 119, 142 N.M. 518, 167 P.2d 966 29

*State v. Foster*, 1998 NMCA 163, 126 N.M. 177, 967 P.2d  
852 22

*State v. Haskins*, 2008 NMCA 86, 144 N.M. 247, 186 P.3d 916 26

*State v. Herrera*, 2001 NMCA 73, 131 N.M. 22, 33 P.3d 22 39

*State v. Hunter*, 2006 NMSC 43, 140 N.M. 406, 143 P.3d 168,  
*cert. quashed*, 139 N.M. 568, 136 P.3d 569 43

*State v. Johnson*, 57 N.M. 716, 263 P.2d 282 (1953) 19

*State v. Larson*, 94 N.M. 795, 617 P.2d 1310 (1980) 30

*State v. Lasner*, 2000 NMSC 38, 129 N.M. 806, 14 P.3d 1282 21, 22, 24

*State v. Martin*, 101 N.M. 595, 686 P.2d 937 (Ct.App. 1984) 24

*State v. Martinez*, 2006 NMCA 68, 139 N.M. 741, 137 P.3d 1195 35

*State v. Martinez*, 2007 NMCA 160, 143 N.M. 96, 173 P.3d 18 39

*State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979) 17

*State v. Orosco*, 113 N.M. 780 (1992) 31

*State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991) 30, 31

*State v. Peterson*, 1998 NMCA 49, 125 N.M. 55, 956 P.2d 854 32

*State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990) 30-32, 34

*State v. Romero*, 2000 NMCA 29, 128 N.M. 806, 999 P.2d 1038 38

*State v. Romero*, 2005 NMCA 60, 137 N.M. 456, 112 P.3d 1113 25

*State v. Sedillo*, 76 N.M. 273 414 P.2d 500 (1966) 19

*State v. Smith*, 2001 NMSC 4, 130 N.M. 117, 19 P.3d 254 23

*State v. Torres*, 1999 NMSC 10, 127 N.M. 20, 976 P.2d 20

17, 22

*State v. Trevino*, 116 N.M. 528, 865 P.2d 1172 (1993) 31, 38

*State v. Ulibarri*, 1999 NMCA 142, 128 N.M. 546, 994  
P.2d 1164 13

*State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974) 43-44

*State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966) 17

**NEW MEXICO STATUTES**

NMSA 2008, § 28-22-1 39

NMSA § 28-22-2(A) 40

NMSA 2008, § 28-22-2(B) 40

NMSA 2008, § 28-22-3 41

NMSA 2008, § 28-22-4(A) 40-41

NMSA 2008, 30-6-114

NMSA 2008, 30-6-31

NMSA 2008, 30-9-13 (A-C) 1, 26

NMSA 2008, § 30-9-14.1 28

NMSA 2008, § 30-9-14.2 28

NMSA 2008, 31-6-13, 15

NMSA 2008, § 31-6-3 14

NMRA 2008, 31-6-614

NMSA 2008, 31-6-11(B) 15

**NEW MEXICO RULES**

NMRA 2008 Rule 11-402 24

NMRA 2008, Rule 11-403 22, 24

NMRA 2008, Rule 11-611(b) 24

NMRA 2008, UJI 14-132 30, 34-35

NMRA 2008, UJI 14-8002 14

NMRA 2008, Rule 16-101 42

**CASES FROM OTHER STATES**

N/A

**STATUTES FROM OTHER STATES**

N/A

**OTHER SECONDARY AUTHORITIES**

Dictionary.reference.com 27